No. 87-1814

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Petitioner,
v.
COLUMBIA PICTURES INDUSTRIES, INC., *et al.*,
UNITED STATES COPYRIGHT OFFICE and ITS REGISTER,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF RESPONDENTS COLUMBIA PICTURES INDUSTRIES, INC., *et al.*

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STATEMENT OF THE CASE

Under the Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq.* (1982 & Supp. IV 1986), cable systems obtain a compulsory license to retransmit copyrighted broadcast programming, 17 U.S.C. § 111(c), by depositing with the Copyright Office a statement of account and royalty fee, 17 U.S.C. § 111(d)(1). For larger cable systems, the amount of royalty fees paid is intended to be commensurate with the amount of distant non-network broadcast programming carried. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 90, *re-*

printed in 1976 U.S. Code Cong. & Admin. News 5659. Congress determined that cable retransmission of such broadcast programming, unlike the retransmission of local broadcast programming and programming supplied by the three national broadcast networks, "causes damage to the copyright owner by distributing the program in an area beyond which it has been licensed" and is "of direct benefit to the cable system by enhancing its ability to attract subscribers and increase revenues." *Id.*

Accordingly, Congress created "distant signal equivalent" ("DSE") values. 17 U.S.C. § 111(d)(1)(B); H.R. Rep. No. 1476 at 90. It assigned a .25 DSE value to distant non-network affiliates and a 1.0 DSE value to distant independent stations, in light of "the different amounts of viewing of non-network programming carried by such stations." H.R. Rep. No. 1476 at 90. The DSE values of the distant signals retransmitted by a cable system are combined, and then the statutory percentage rates, 17 U.S.C. § 111(d)(1)(B)(i)-(iv), are applied to the DSE total.[1]

The resulting values are then multiplied by "the gross receipts from subscribers to the cable service . . . for the basic service of providing secondary transmissions of primary broadcast transmitters." 17 U.S.C. § 111(d)(1)(B). The parties to this case disagree as to what revenues must be included in "gross receipts."

Cable systems offer subscribers two types of service: "basic" and "pay-cable." *See* H.R. Rep. No. 1476 at 88. "Basic" service usually consists of re-

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[1] *See* Appendix to the Petition ("Pet. App.") 8a-9a (explaining fee calculation with illustrations).

transmitted broadcast channels bundled together with cable-originated (*i.e.*, nonbroadcast) channels in packages (or "tiers" of channels) that are offered to subscribers for a single monthly charge for each package.[2] *See, e.g., Jones* v. *Wilkinson*, 800 F.2d 989, 1002 (10th Cir. 1986), *aff'd*, 107 S. Ct. 1559 (1987); *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9, 18-19 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977). "Pay-cable" services, such as HBO and Showtime, consist of uninterrupted nonbroadcast programming and are transmitted to subscribers for per-program or per-channel fees over and above the basic service charge(s). *See, e.g., Home Box Office*, 567 F.2d at 18 & n.8.

In two rulemakings, the Copyright Office determined that, when a cable system chooses to bundle both broadcast and nonbroadcast channels on one tier of service, offered to subscribers for a single monthly fee, all subscriber revenues from that tier must be included in the cable system's "gross receipts" under 17 U.S.C. § 111(d)(1)(B). The Office rejected the notion that a portion of the revenues from such a tier may be "allocated" to nonbroadcast programming and excluded from gross receipts. 43 Fed. Reg. 27,827 (1978); 49 Fed. Reg. 13,029 (1984).

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[2] Subscribers must pay for the entire package; they cannot purchase only the broadcast channels or only the nonbroadcast channels. *See Report, Inquiry into the Scrambling of Satellite Television Signals*, 2 F.C.C. Record 1669, 1686 (1987) ("Because basic cable services are not sold *a la carte* on cable, no individual retail rates are available for them. . . . [Also,] the pay cable subscriber must 'buy through' basic cable to purchase the pay service, even if he is not interested in basic service *per se*.").

The Copyright Office rejected such an allocation in its first rulemaking implementing § 111. It explained that "[t]he origination and retransmission services are clearly part of an integral package offered to subscribers," and that there is "no statutory justification or basis for allocating the monthly fee." 43 Fed. Reg. at 27,828.

In 1980, certain cable operators asked the Office to reconsider its requirement that all subscriber revenues from a bundled tier be included in "gross receipts." 45 Fed. Reg. 45,270, 45,273 (1980). The Office agreed to receive comments and hold a public hearing. 46 Fed. Reg. 30,649, 30,651 (1981).

At the hearing, petitioner National Cable Television Association, Inc. ("NCTA") testified *in opposition to* proposals to permit allocation. In its prepared testimony, NCTA stated that allocation of revenues from a tier containing broadcast and nonbroadcast programming *"would add undue complication to the process and might well be a subject for dispute and abuse."* Court of Appeals Appendix ("C.A. App.") 334 (emphasis added). In his oral testimony, NCTA's representative, Robert W. Ross, reiterated NCTA's opposition to allocation:

> [W]e encourage you *not* to go that route.
>
> . . . .
>
> . . . We think that is just opening up *a hornet's nest of problems* to try to attempt to do that.
>
> There may well be . . . some cable companies that are interested in attempting to do that; in which case we wish them good luck. But *that is not the position that reflects the attitude of the Association.*
>
> . . . .

> . . . I would have a difficult time trying to attribute those revenues, and I would suggest that you don't try to go down that road, because I think *you could create a regulatory monster* that would consume more resources than you care to dedicate to it—and, certainly—more resources than we care to dedicate to it.

Id. 325-27 (emphasis added). NCTA stated that it accepted the Office's 1978 interpretation prohibiting allocation.[3]

In promulgating its final regulation in 1984, the Copyright Office reaffirmed its 1978 interpretation. 49 Fed. Reg. at 13,035. It concluded that the Act "does not permit any proration or other allocation of . . . gross receipts . . . where any secondary transmission service is combined with nonbroadcast services in program packages, clusters, or tiers." *Id.* The Office also questioned whether, even if allocation were permitted, a fair method of allocation could be designed, and whether abuse by cable systems in making allocations could be avoided. *Id.* Finally, it found that "[t]o a large extent . . . a cable system can control its own 'tiering' destiny . . . [by] offer[ing] secondary transmission services solely as part of minimum service or on discrete tiers, exclud-

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[3] *See* J.A. 332:

> [MS. SCHRADER:]
>
> . . . .
>
> Do I understand . . . that you are accepting the interpretation the Copyright Office has placed on the Act in this situation? That as far as the gross receipts calculation is concerned, a cable system would have to include all of the receipts from the optinal [sic] tier?
>
> MR. ROSS: That is correct.

ing expensive origination services in either case." *Id.*[4]

Prior to the conclusion of the rulemaking, NCTA filed a complaint in district court advancing an interpretation of § 111 directly contrary to its position before the Copyright Office. Whereas NCTA had previously opposed allocation, it now sought a declaratory judgment that cable systems must be permitted to allocate. NCTA did not advocate a particular method of allocation; it urged that the matter be sent back to the Office for the development of regulations concerning allocation.[5]

The district court rejected the Copyright Office's interpretation on the ground that it "seems unfair," Pet. App. 49a, and accepted NCTA's interpretation. It reasoned that because royalty fees paid under § 111 were intended to compensate copyright owners for the retransmission by cable systems of distant non-network broadcast programming, *see* H.R. Rep. No. 1476 at 90, "Congress did not intend to include revenues from nonbroadcast programming in the calculation of 'gross receipts.'" Pet. App. 50a. The

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[4] The views advanced in the indented quotation on page 5 of NCTA's Petition were *not* part of the explanation the Copyright Office provided when it issued the 1984 regulation. The quoted sentence appeared in a letter written by the Office's General Counsel more than two years later in response to certain hypotheticals. *See* Pet. App. 30a. The court of appeals ruled that the issues raised in the letter are "unripe for judicial review," *id.*, and NCTA has not sought review of that ruling.

[5] Memorandum in Support of Plaintiff's Motion for Summary Judgment and Plaintiff's Opposition to Defendants' Motion To Dismiss, Dec. 5, 1983, at 37 n.18, 44 n.26, and 45.

court did not prescribe a method of allocation, but left that task to the Copyright Office. *Id.* 54a, 58a.

The court of appeals unanimously reversed. It concluded that the district court had misunderstood the function of DSEs in the statutory scheme. *Id.* 22a. Although the district court had "correctly observed that liability under the compulsory license was to be limited to the retransmission of distant non-network programming," *id.* 22a-23a (citation omitted), it had "failed to appreciate how the distant signal equivalents satisfy that intention," *id.* 23a. "[T]he DSE value—and hence the percentage of the fixed gross receipts base due as a fee—rises with each distant broadcast channel retransmitted . . . ." *Id.* In excluding revenues attributable to non-broadcast programming from "gross receipts" to ensure that royalty payments are limited to distant non-network programming, the district court had disregarded Congress's decision to use the DSEs for that purpose. *Id.*

REASONS FOR DENYING THE WRIT

1. NCTA's current interpretation, which contradicts its position in the rulemaking, was properly rejected.

NCTA's contention that the term "gross receipts" includes only revenues "attributable" to the retransmission of broadcast programming is wholly untenable, and was properly rejected by the court of appeals. First, NCTA's interpretation "violate[s] the canon of construction that effect should be given to every word of the statute so that no part is rendered 'inoperative or superfluous.' " *Id.* 21a-22a (citation omitted). The relevant statutory language is "gross receipts from subscribers . . . for the basic

service of providing secondary transmissions of primary broadcast transmitters." As the court of appeals noted, NCTA's interpretation

> reads "basic service" out of the statute; under this view, the language could as easily be "gross receipts from subscribers . . . for secondary transmissions of primary broadcast transmitters."

Id. 22a.

Second, it was well understood in 1976 that the term "basic service" encompassed non-broadcast programming (as well as broadcast programming). As NCTA conceded before the court of appeals, in 1976 cable systems offered one or more channels of cable-originated programming "as part of their broadcast retransmission service." [6] Moreover, the inclusion of nonbroadcast programming as part of basic service was explicitly brought to Congress's attention during the hearings on copyright revision. For example,

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[6] Brief for Appellee National Cable Television Association, Inc. at 8. Before the adoption of the Act, nonbroadcast channels were included in the basic retransmission service as a result of the FCC's "program-origination" requirement for cable systems with more than 3,500 subscribers; the FCC required that a cable system operate "to a significant extent as a local outlet by cablecasting" and have "available facilities for local production and presentation of programs other than automated services." *First Report and Order,* 20 F.C.C.2d 201, 223 (1969) (setting forth § 74.1111(a)); *see United States* v. *Midwest Video Corp.,* 406 U.S. 649 (1972); *see also First Report and Order* in Docket No. 19554, 52 F.C.C.2d 1, 47 (1975) (expressly exempting basic nonbroadcast channels from FCC rules restricting "pay-cable"); *Cable Television Report and Order,* 36 F.C.C.2d 143, 193 (1972) (recognizing that basic cablecasting would develop through the availability of "interconnected programming via satellite or interstate terrestrial facilities").

Community Antenna Television Association, a cable group, testified that nonbroadcast movie channels were regularly offered in combination with broadcast services at no separate charge: "Many systems have a 24-hour movie channel. That is not something you pay extra for, that is just part of the service." [7]

In light of the bundling of broadcast and nonbroadcast programming that existed in 1976 and Congress's awareness of such bundling, the absence of any provision in § 111(d)(1)(B) for allocation of broadcast and nonbroadcast revenues is highly significant. As the court of appeals noted, "the clear implication of the phrase 'basic service' [is] that cable services are typically provided in packages." Pet. App. 22a. If Congress had intended to permit allocation, there presumably would have been a reference to allocation in the statute, or at least in the House Committee Report, which contains a step-by-step description of how royalty fees are to be calculated. H.R. Rep. 1476 at 90.[8]

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[7] *Hearings on H.R. 2223 Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 623 (1975).

[8] Congress's intent to include in "gross receipts" *all* subscriber revenues other than those for pay-cable services is underscored by earlier versions of the copyright revision bill, which contained more elaborate specifications for the statement of account to be filed by cable systems.

Section 111(d)(2)(A) of S. 1361, 93rd Cong., 2d Sess. (1974), and S. 22, 94th Cong., 1st Sess. (1975), divided revenues into two categories for reporting purposes: (1) gross revenues "for advertising, leased channels, and cablecasting for which a per-program or per-channel charge is

Third, the statutory scheme makes clear that revenues from a bundled tier should not be allocated to limit "gross receipts" to revenues attributable to the carriage of distant non-network programming. To make royalty fees commensurate with the amount of distant non-network programming carried, Congress created the DSE value, which it considered "central to the computation of the royalty fees payable." H.R. Rep. No. 1476 at 100. In approving allocation in order to limit royalty fees to the carriage of distant non-network programming, the district court reduced cable royalties to achieve the same purpose already served by the DSEs. There is no reason to think that Congress intended that the amount of distant non-

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made," and (2) gross revenues paid "by subscribers for the basic service of providing secondary transmissions of primary broadcast transmitters."

Significantly, the only subscriber revenues excluded from the second category were those for cablecast programming "for which a per-program or per-channel charge is made," *i.e.*, pay-cable channels. Subscriber revenues "attributable" to cablecast programming other than pay cable were thus to be included in the gross revenues for the basic retransmission service.

This understanding is confirmed by the Senate Report accompanying S. 22, which stated that "[*i*]*ncome received from the installation of equipment or from advertising accompanying CATV-originated program*[*s*] *is excluded from the computation of the gross receipts of a cable system.*" S. Rep. No. 473, 94th Cong., 1st Sess. 81 (1975) (emphasis added). As Professor Nimmer noted, "[i]f subscriber payments attributable to such originated programming were to be excluded [from 'gross receipts'], it would hardly be necessary to add that in addition advertising income for such programming was also to be excluded." 2 *Nimmer on Copyright* § 8.18[E] at 8-213 n.137 (1987 ed.).

network programming carried be accounted for both by the DSEs and by allocation of "gross receipts." [9]

Fourth, both methods of allocation proposed by NCTA in the district court would create the "hornet's nest of problems" that NCTA cited in 1981. Pet. App. 25a. A flat per-channel allocation cannot be reconciled, as NCTA has recognized, with "the

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[9] *See also* Pet. App. 24a:

> If an allocation between broadcast and non-broadcast programming revenues in each tier were required by the statutory scheme, one would wonder why Congress did not call for a further allocation, to remove local broadcast revenues from gross receipts, and do away with the DSE system altogether. The answer, it seems to us, must be that DSE calculations were considered more practical and were therefore adopted in lieu of attempts at such allocation.

NCTA argues that revenues "attributable" to basic non-broadcast programming must be excluded from "gross receipts" because "Congress had no logical basis to demand an additional statutory payment for the right to carry programming which cable operators had already acquired and paid for through private negotiations." Pet. 24. The difficulty with this argument is that "gross receipts" are not payments to copyright owners; "gross receipts" and the DSE values are interrelated elements in the formula chosen by Congress to produce a level of royalty payments it considered appropriate. *See* H.R. Rep. No. 1476 at 91. The inclusion in "gross receipts" of revenues "attributable" to basic non-broadcast programming does not result in an unwarranted payment to copyright owners any more than does the inclusion of revenues "attributable" to local or network broadcast programming. Congress determined that the cable retransmission of local or network broadcast programming does not require compensation to copyright owners, see page 2, *supra*, but it is undisputed that revenues "attributable" to such programming must be included in "gross receipts."

financial realities of the cable business." [10] It also would enable a cable system to reduce "gross receipts" unfairly by loading a tier containing broadcast programming with cable-originated channels that are inexpensive or free to the cable system. 49 Fed. Reg. at 13,035 n.15. Allocation based on measurements of actual viewership, a position never advocated during the two rulemakings, is impractical and incompatible with the statutory purpose of achieving a method of compensating copyright owners that is simple and efficient and has low transaction costs. *See* H.R. Rep. No. 1476 at 89. Measurements within specific service areas of viewership of individual channels carried by cable systems are not currently available, *see* C.A. App. 327, would be prohibitively expensive for most cable systems, and would require costly monitoring to prevent abuse.[11]

2. The Copyright Office's interpretation of section 111 is entitled to deference.

NCTA asserts that the Copyright Office has no authority to interpret the Copyright Act in a man-

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[10] C.A. App. 457 n.3 (brief filed by NCTA in *Cox Cable New Orleans, Inc.* v. *City of New Orleans*, 594 F. Supp. 1452 (E.D. La. 1984)).

[11] By contrast, including all revenues from a bundled tier in gross receipts imposes no burden on a cable system. As the Copyright Office noted, a cable system can largely control its own " 'tiering' destiny." 49 Fed. Reg. at 13,035. If the inclusion in "gross receipts" of revenues "attributable" to nonbroadcast programming is considered burdensome, a cable system can simply unbundle the nonbroadcast channels from its basic retransmission service tiers and offer them for a separate monthly charge. Cable systems are free to "forego those marketing advantages that now lead them to pay higher than necessary fees." Pet. App. 26a.

ner "affecting the substantive rights of private parties." Pet. 10; *see also id.* 14. That assertion is erroneous.

NCTA fails to address the decisions of this Court recognizing that the Copyright Office's interpretations are entitled to deference. This Court deferred to the Office's construction of the law in *Mazer* v. *Stein*, 347 U.S. 201, 213-14 (1954), and again in *Goldstein* v. *California*, 412 U.S. 546, 567-69 (1973). In *De Sylva* v. *Ballentine*, 351 U.S. 570, 577-78 (1956), the Court made clear that it would have deferred but for the fact that the Office had not made a "confident interpretation." NCTA discusses none of these cases. Numerous decisions of the courts of appeals have also accorded deference to the Office's interpretations.[12] NCTA ignores most of those decisions as well.

NCTA errs in suggesting that the Copyright Office has been "given latitude only in strictly ministerial functions and in determining whether a particular submission was 'copyrightable.' " Pet. 14 n.20 (citations omitted). For example, in *Goldstein* v. *California*, this Court deferred not to the determination whether a particular submission was copyrightable, but to the Copyright Office's general view that claims to exclusive rights in mechanical recordings

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[12] *See Norris Indus., Inc.* v. *ITT*, 696 F.2d 918, 922 (11th Cir.), *reh'g denied*, 703 F.2d 582, *cert. denied*, 464 U.S. 818 (1983); *Schnapper* v. *Foley*, 667 F.2d 102, 110 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 948 (1982); *Esquire, Inc.* v. *Ringer*, 591 F.2d 796, 801 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 908 (1979); *Eltra Corp.* v. *Ringer*, 579 F.2d 294, 297-98 (4th Cir. 1978); *Hoffenberg* v. *Kaminstein*, 396 F.2d 684, 685 (D.C. Cir.) (*per curiam*), *cert. denied*, 393 U.S. 913 (1968).

(or in the performances they reproduce) were not entitled to copyright protection. 412 U.S. at 567-68. Similarly, the interpretation accorded deference in *Mazer* v. *Stein* was not a determination concerning a particular work, but a general interpretation set forth in a regulation, 37 C.F.R. § 202.8 (1949). 347 U.S. at 212-13.[13]

Contrary to what NCTA suggests, the opinion below does not conflict with *Bartok* v. *Boosey & Hawkes, Inc.*, 523 F.2d 941 (2d Cir. 1975).[14] First, in *Bartok*, which involved a dispute as to who could renew a copyright, it was "unlikely . . . that the Register of Copyrights considered the situation" before the court. *Id.* at 947 n.10. The Register had adopted a form containing a general definition of "posthumous" work, but had not addressed the issue that later came before the court. *Id.* at 946. Moreover, the Register had "permitted the filing of both renewals[,] expressly declining to adjudicate as between them." *Bartok* v. *Boosey & Hawkes, Inc.*, 382 F. Supp. 880, 882 (S.D.N.Y. 1974). Here, the Copyright Office conducted rulemaking proceedings and adopted a regulation that directly addresses the issue of allocation.

Second, as the court below noted, because the Second Circuit "held the interpretation put forward by the Office was inconsistent with legislative intent,

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[13] *See also Schnapper* v. *Foley*, 667 F.2d at 110 (according deference to the Copyright Office's consistent acceptance for registration of federally commissioned works).

[14] Unlike Cablevision Company, petitioner in No. 87-1642, NCTA makes no claim that the decision below conflicts with *De Sylva* v. *Ballentine*.

. . . its statement on the deference due the Office would seem to be a dictum." Pet. App. 21a.

Third, the court below did not reject the *Bartok* dictum. The court explained that, even if the dictum were "generally sound," "the Second Circuit was not considering section 111" (which had not yet been enacted) and its dictum should not be extended to interpretations of that provision. *Id.* The court below also emphasized that its own conclusion concerning deference was limited to interpretations of § 111. *Id.*

The relevant provisions of Title 17 confirm that the Copyright Office has the power to interpret § 111. Section 702 expressly authorizes the Register "to establish regulations . . . for the administration of the functions and duties made the responsibility of the Register under this title." This language provides ample support for the promulgation of an interpretive regulation such as that at issue here; indeed, similar language has been construed to authorize the promulgation of substantive regulations having the force of law.[15] In addition, Congress gave the Office specific authority to issue regulations governing statements of account and royalty fees: § 111(d)(1) provides that cable systems' semi-annual filings are to be made "in accordance with requirements that the Register shall . . . prescribe by regulation."

NCTA's position is also self-contradictory. Pet. App. 17a. NCTA contends that the Copyright Office

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[15] *See, e.g., National Nutritional Foods Ass'n* v. *Weinberger*, 512 F.2d 688, 696-97 (2d Cir.) (§ 701(a) of the Food, Drug & Cosmetic Act, 21 U.S.C. § 371(a)), *cert. denied*, 423 U.S. 827 (1975).

can only perform ministerial functions and decide whether individual works are copyrightable. But throughout this litigation NCTA has urged that the matter be sent back to the Office for the development of regulations governing allocation.[16] NCTA asserted below that it could "demonstrate to the Copyright Office that a 'per channel' allocation scheme is reasonable."[17] Deciding the validity of this or any other method of allocation would not be "strictly ministerial"; it would require substantive policy choices as to the proper method of allocation, would have an impact of tens of millions of dollars annually, and would affect thousands of cable systems and hundreds of copyright owners.[18] If, as NCTA contends, the Copyright Office were truly unable to make "substan-

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[16] *See, e.g.*, Transcript of oral argument in the court of appeals, Oct. 15, 1987, at 45; Memorandum in Support of Plaintiff's Motion for Summary Judgment and Plaintiff's Opposition to Defendants' Motion To Dismiss, Dec. 5, 1983, at 37 n.18, 44 n.26, and 45.

[17] Brief of Appellee National Cable Television Association, Inc. at 38 n.33.

[18] In a statement to NCTA's counsel at oral argument, the court of appeals focused on the contradiction that lies at the heart of NCTA's position:

> QUESTION: We're talking about a method of allocation which is impregnated with policy concerns, and which is so difficult and so confusing that no one is prepared even in this Court to talk about. You're saying, send that back to the Copyright Office; have them issue a regulation that accomplishes that and, of course, that's the very Copyright Office that we [sic; should be "you"] claim doesn't have any authority to issue regulations.

Tr. of Oct. 15, 1987 at 42-43.

tive interpretations," it could scarcely resolve such an important issue.

NCTA cites the Copyright Office's lack of enforcement power. Pet. 11-12. There is no reason, however, for deference to turn on the existence of power to commence enforcement actions. This Court certainly has not linked deference to enforcement power; it has recognized that deference should be accorded to the interpretations of the Copyright Office [19] and of other agencies that do not enforce the law.[20]

Nor is there any merit in NCTA's contention that the Copyright Office's interpretations are unworthy of deference because the Office "[f]rom its inception . . . has had an institutional bias favoring copyright owners." Pet. 14-15. First, NCTA's views were fully and fairly considered by the Copyright Office; in fact, the Office *accepted* the position concerning allocation that NCTA advanced at the 1981 hearing. *See* Pet. App. 14a ("No doubt influenced in part by the NCTA's position," the Office disallowed allocation.). Second, neither this Court nor the courts of appeals have considered the Copyright Office to be biased in favor of copyright owners.[21]

Third, the statements of former Registers of Copyrights Barbara Ringer and Abraham Kaminstein quoted at Pet. 16-17 & nn. 23-24 were made in 1975 in a legislative hearing addressing what the law

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[19] *See Goldstein* v. *California*, 412 U.S. at 568-69; *De Sylva* v. *Ballentine*, 351 U.S. at 577-78; *Mazer* v. *Stein*, 347 U.S. at 213.

[20] *See, e.g., Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979) (Council on Environmental Quality).

[21] *See* cases cited at page 13 and note 12, *supra*.

should be, not in a rulemaking proceeding interpreting the statute enacted by Congress. NCTA has not cited a single example of bias or preferential treatment in the rulemaking proceedings concerning § 111 or otherwise in the administration of the Act. NCTA's claim that the Copyright Office "would invariably resolve issues in favor of the copyright owners" (Pet. 18) is belied by the very rulemaking at issue here. In the same 1984 Notice in which it addressed the issue of allocation, the Office rejected MPAA's positions on several other issues.[22]

Fourth, a statement by a Register of Copyrights that he or she favors authors, composers, and artists is analogous to a statement by the Administrator of EPA that he favors the environment, or by the Commissioner of Food and Drugs that he seeks to protect consumers. Such expressions do not bar those officials from interpreting statutes or, indeed, making adjudicatory decisions in matters involving manufacturers. General support for an agency's protective mission does not constitute bias.

3. NCTA's separation-of-powers contention was not presented below and lacks merit.

NCTA also contends that the separation-of-powers doctrine precludes deference to the Copyright Office's interpretations. Pet. 19-22. This issue was not raised below. "Only in exceptional cases will this Court review a question not raised in the court be-

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[22] *See, e.g.*, 49 Fed. Reg. at 13,032 (part-time carriage on a single cable channel of distant television stations having different DSE values); *id.* at 13,036 (specification of basis for classifying particular television station carriage as local).

low," [23] and there are no exceptional circumstances here.

NCTA was fully aware of the issue. A separation-of-powers challenge to the Copyright Office was considered (and rejected) in a case—*Eltra Corp.* v. *Ringer*, 579 F.2d 294 (4th Cir. 1978)—that was cited in briefs in this case in both the district court [24] and the court of appeals,[25] and in the Copyright Office's notice issuing its final regulation in 1984.[26] Moreover, the principal case now relied on by NCTA —*Bowsher* v. *Synar*, 106 S. Ct. 3181 (1986)—was a highly publicized decision handed down more than a year before NCTA filed its brief in the court of appeals. NCTA was obviously aware of the separation-of-powers issue, but deliberately decided not to raise it.[27]

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[23] *Lawn* v. *United States*, 355 U.S. 339, 362 n.16 (1958) (citations omitted); *see, e.g., Delta Airlines, Inc.* v. *August*, 450 U.S. 346, 362 (1981); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

[24] *See* NCTA's Memorandum of Points and Authorities in Support of NCTA's Renewed Motion and Cross-Motion for Summary Judgment and in Opposition to the Copyright Owners' and Copyright Office's Motion for Summary Judgment, June 9, 1986, at 43-44.

[25] *See* Reply and Answering Brief for Appellants/Cross-Appellees Motion Picture Association of America, Inc., *et al.*, at 6; Reply Brief for Appellee/Cross-Appellant Cablevision Company at 6.

[26] 49 Fed. Reg. at 13,031 n.10.

[27] NCTA cannot claim that it was surprised by the court of appeals's deference to the Copyright Office. The district court also recognized that the test of *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984), is applicable, Pet. App. 46a-47a, and the issue of deference was fully briefed in the court of appeals.

NCTA's contention lacks merit in any event. The Copyright Office has been supervised by the Librarian of Congress since 1897.[28] On three separate occasions, this Court has recognized that the Office's considered interpretations are entitled to deference, without suggesting the slightest doubt as to the constitutionality of the Office's interpretive role.[29] As the Fourth Circuit noted in *Eltra*, "it seems incredible that, if there were a constitutional infirmity . . . , it would have so long escaped notice by either the Supreme Court or the bar or that the Supreme Court would have given implicit authorization [in *Mazer*, *De Sylva*, and *Goldstein*] for the exercise by the Register of the power to issue rules and regulations." 579 F.2d at 299.

There is no constitutional infirmity. NCTA repeatedly cites and quotes from *Bowsher*, but fails to mention "[t]he critical factor" relied upon by this Court: Congress's power to remove the Comptroller General "at any time" on "very broad" grounds. 106 S. Ct. at 3189-90. Congress has no comparable power to remove the Librarian of Congress, who directs and supervises the Copyright Office and approves all regulations issued by the Office,[30] including the regulations at issue here.[31] Congress has specified that the Librarian of Congress is to be appointed by the President with the advice and consent of the

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[28] *See* Act of Feb. 19, 1897, ch. 265, 29 Stat. 538, 545.

[29] *See Goldstein* v. *California*, 412 U.S. at 567-69; *De Sylva* v. *Ballentine*, 351 U.S. at 577-58; *Mazer* v. *Stein*, 347 U.S. at 213.

[30] *See* 17 U.S.C. §§ 701(a), 702.

[31] *See* 43 Fed. Reg. at 27,830; 49 Fed. Reg. at 13,038.

Senate,[32] and has *not* given itself the power to remove the Librarian.[33] Assuming for the sake of argument that the Copyright Office exercises "executive" power when it interprets § 111 or other provisions of the Copyright Act, the lack of congressional power to remove the Librarian of Congress readily distinguishes *Bowsher*.[34]

NCTA's reliance on *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (*per curiam*), is also misplaced. There, four members of the Federal Election Commission were appointed by the President *pro tempore* of the Senate and the Speaker of the House. The other two members were nominated by the President, but his nominations were subject to confirmation not only by the Senate but also by the House. *Id.* at 126. The Court concluded that this procedure violated the Appointments Clause, Art. II, § 2, cl. 2, because the members of the Commission performed "administrative functions [that] may . . . be exercised only by persons who are 'Officers of the United States.'" *Id.* at 141. This ruling does not help NCTA, for the Librarian of Congress is appointed by the President with the ad-

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[32] *See* 2 U.S.C. § 136 (1982).

[33] The power to remove the Librarian rests with the President. "The power to remove is, in the absence of statutory provision to the contrary, an incident of the power to appoint." *Burnap* v. *United States*, 252 U.S. 512, 515 (1920) (citations omitted); *see Shurtleff* v. *United States*, 189 U.S. 311, 314-16 (1903); *Keim* v. *United States*, 177 U.S. 290, 293-94 (1900); *Ex parte Hennen*, 38 U.S. (13 Peters) 230, 259 (1839).

[34] *See* 106 S. Ct. at 3188 n.4 (stressing that "[t]his case involves nothing like" statutes that specify that agency members are removable by the President for specified causes or do not specify a removal procedure).

vice and consent of the Senate—one of the modes of appointment that the Appointments Clause permits for "Officers of the United States." *See Eltra*, 579 F.2d at 301.[35]

4. The court of appeals concluded that the Copyright Office's interpretation is superior to NCTA's.

There are many indications in the court of appeals's opinion that deference was not critical to its rejection of NCTA's interpretation. The court declared that "[t]he Copyright Office's regulation is . . . the interpretation before us that *best accounts for the statutory language*," and that it "evinces *a full understanding* of the structure and purpose that underlie [the statutory] language." Pet. App. 22a (emphasis added). The court found "*no requirement in the statute or its history* that the fee paid by a cable system reflect precisely the value it receives from retransmissions." *Id.* 24a (emphasis added). The court concluded that "including all revenues from any separately priced tier that contains one or more broadcast stations is a convenient, *indeed perhaps the only reasonable*, way of computing gross receipts that ensures a revenue base large enough to perform the function Congress intended—reimbursing copyright owners." *Id.* 26a (emphasis added). These statements demonstrate that the result would have

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[35] *INS* v. *Chadha*, 462 U.S. 919 (1983), another case cited by NCTA, is totally irrelevant. *Chadha* holds that, when Congress exercises legislative power, it ordinarily must act through "bicameral passage followed by presentment to the President." *Id.* at 954-55. Since NCTA makes no claim that the Copyright Office exercises legislative power, *Chadha* does not support its position.

been the same even if the court had not accorded deference to the Copyright Office.[36]

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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[36] In an attempt to manufacture some basis for review by this Court, NCTA asserts that the decision below "dramatically increases" royalty fees. Pet. 6. It would be more accurate to state that NCTA's interpretation would dramatically reduce royalty fees. The decision below simply reaffirms the interpretation of § 111 that the Copyright Office has adhered to since 1978.